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10
11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14 **MANUEL HILL,**

15 Plaintiff,

16 v.

17 **RODERICK HICKMAN, et al.,**

18 Defendants.
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21
22

C 07-5125 JF

**NOTICE OF MOTIONS,
DEFENDANTS' MOTION TO
STRIKE PLAINTIFF'S
OPPOSITION,
DEFENDANTS' MOTION TO
DISMISS FOR FAILURE TO
OBEY COURT ORDERS AND
PROSECUTE, DEFENDANTS'
MOTION TO STAY TIME TO
FILE REPLY/REQUEST FOR
EXTENSION OF TIME, AND
MEMORANDUM OF POINTS
AND AUTHORITIES**

23 TO PLAINTIFF MANUEL HILL, IN PRO SE:

24 PLEASE TAKE NOTICE that Defendants Hickman and Horel (Defendants) move to strike
25 Hill's Opposition to Defendants' Motion to Dismiss because it was not timely filed and served,
26 and move to dismiss this action for failure to obey court orders and lack of prosecution.

27 PLEASE TAKE FURTHER NOTICE that Defendants move to stay the time in which to file
28 and serve a reply to Hill's opposition to Defendants' motion to dismiss until at least fifteen days

Not. Mots., Mot. Strike Pl.'s Opp'n, Mot. Dismiss, Mot. Stay Time File Reply/Rqst. EOT

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1 after the Court rules on Defendants' motion to strike Hill's opposition, and Defendants' motion
 2 to dismiss for failure to obey court orders and lack of prosecution. Alternatively, Defendants
 3 move the Court for an extension of time in which to file a reply to Plaintiff's opposition up to
 4 and including September 15, 2008. These motions are based upon this notice of motion, the
 5 memorandum of points and authorities, the declaration of J. Nygaard, and the Court's file.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **STATEMENT OF THE CASE**

8 Plaintiff Manuel Hill is a state prisoner incarcerated at Pelican Bay State Prison. Hill filed a
 9 complaint under 42 U.S.C. § 1983 alleging that Defendants Hickman and Horel were deliberately
 10 indifferent to his serious medical needs. (Docket No. 1.) This Court reviewed the complaint
 11 under 28 U.S.C. § 1915A, and found that liberally construed Hill alleged a cognizable Eighth
 12 Amendment claim. (Docket No. 6 at 2.)

13 On May 16, 2008, Defendants filed and served Defendants' Motion to Dismiss. (Docket
 14 No. 10.) Hill's opposition to Defendant's motion to dismiss was due within thirty days of filing,
 15 which was June 17, 2008. (Docket No. 6 at 3.) Hill's untimely opposition to Defendants'
 16 motion to dismiss was "filed" on July 30, 2008. (Docket No. 14.)

17 **ARGUMENT**

18 **I. HILL'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS SHOULD 19 BE STRICKEN AS UNTIMELY.**

20 A district court has the inherent authority to control its own docket and calendar. *Landis v.*
 21 *North American Co.*, 299 U.S. 248, 254-55 (1936). Hill's opposition to Defendants' motion to
 22 dismiss was not timely filed and served. An incarcerated pro se litigant completes 'service' and
 23 'filing' under Federal Rules of Civil Procedure 5(b) and 5(d) upon submission of the documents
 24 to prison authorities for forwarding to the party to be served and the Court. *Faile v. Upjohn Co.*,
 25 988 F.2d 985, 988 (9th Cir. 1993). Hill's proof of service indicates that he served his opposition
 26 on July 24, 2008. (Docket No. 14 at 11.) The envelope he used to mail his opposition to the
 27 Court, however, reflects that his opposition was given to prison authorities for mailing and
 28 postmarked on July 28, 2008. (*Id.* at 12-13.) But even assuming that Hill submitted his papers to

1 prison authorities for mailing on July 24, 2008, it was thirty-seven days late.

2 **II. THIS ACTION SHOULD BE DISMISSED FOR HILL'S FAILURE TO**
 3 **OBEY COURT ORDERS AND LACK OF PROSECUTION.**

4 This Court previously advised Hill that he "must comply with the court's orders in a timely
 5 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
 6 pursuant to Federal Rule of Civil Procedure 41(b)." (Docket No. 6 at 5.) Hill failed to comply
 7 with this Court's February 22, 2008 Order of Service because he "filed" his opposition thirty-
 8 seven days after the deadline. Thus, this case should be dismissed under Federal Rule of Civil
 9 Procedure 41(b) on the basis that Hill failed to comply with court orders and failed to prosecute.

10 The factors to be weighed in determining whether to dismiss for lack of prosecution or
 11 failure to obey court orders are identical. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th
 12 Cir.1992). Those factors are: (1) the public interest in expeditious resolution of litigation; (2) the
 13 court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy
 14 favoring disposition on the merits; and (5) the availability of less drastic sanctions. *See Carey v.*
 15 *King*, 856 F.2d 1439, 1440 (9th Cir.1988) (per curiam). Dismissal is a harsh penalty that should
 16 be imposed only in extreme circumstances. *See Ferdik*, 963 F.2d at 1260. Here, dismissal is
 17 appropriate because all five factors are satisfied. Hill's failure to timely comply with court
 18 orders, and failure to request an extension of time justifies dismissal. Finally, because Hill is
 19 proceeding *in forma pauperis* a less-drastic monetary sanction is not available and would not
 20 serve any purpose. Accordingly, Defendants request that this action be dismissed.

21 **III. THE TIME FOR DEFENDANTS TO FILE A REPLY SHOULD BE STAYED**
 22 **UNTIL THE COURT RULES ON DEFENDANTS' MOTIONS.**

23 Defendants shall file a reply brief no later than fifteen days after Hill's opposition is filed.
 24 (Docket No. 6 at 4.) Hill's opposition was filed on July 30, 2008. (Docket No. 14.) Thus,
 25 Defendants' reply brief is due August 14, 2008. Because Hill's opposition was untimely,
 26 Defendants move this Court to stay the time for Defendants to file a reply until after the Court
 27 rules on Defendants' motion to strike Hill's opposition and Defendants' motion to dismiss for
 28 failure to obey court orders and prosecute.

1 In the alternative, Defendants request an extension of time in which to file a reply. The
 2 Deputy Attorney General assigned to represent Defendants in this case, Lisa Sciandra, is
 3 currently on medical leave and is not expected to return to work until approximately August 18,
 4 2008. (Decl. Nygaard ¶¶ 1, 3.) Because Ms. Sciandra is the attorney who drafted Defendants'
 5 motion to dismiss and is the attorney most familiar with the facts of this case, Defendants request
 6 that their time to file a reply be extended up to and including September 15, 2008. This should
 7 provide Ms. Sciandra with sufficient time to prepare a reply upon returning from medical leave.

8 CONCLUSION

9 Hill's opposition to Defendants' motion to dismiss was not timely filed or served, and Hill
 10 has failed to prosecute this case and comply with Court orders. Thus, Defendants respectfully
 11 request that the Court strike Hill's opposition and dismiss this action. Defendants further request
 12 that the Court stay Defendants' time in which to file a reply to Hill's opposition until at least
 13 fifteen days after the Court rules on Defendants' motion to strike Hill's opposition and
 14 Defendants' motion to dismiss for failure to obey court orders and prosecute. Alternatively,
 15 Defendants request an extension of time to file a reply up to and including September 15, 2008.

16 Dated: August 1, 2008

17 Respectfully submitted,

18 EDMUND G. BROWN JR.
 Attorney General of the State of California

19 DAVID S. CHANEY
 Chief Assistant Attorney General

20 ROCHELLE C. EAST
 Acting Senior Assistant Attorney General

21 MICHAEL W. JORGENSEN
 Supervising Deputy Attorney General

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 23
 24 

25 JENNIFER J. NYGAARD
 26 Deputy Attorney General
 Attorneys for Defendants Hickman and Horel

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **M. Hill v. R. Hickman, et al.**

No.: **C 07-5125 JF**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **August 4, 2008**, I served the attached

**NOTICE OF MOTIONS, DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S
OPPOSITION, DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO OBEY
COURT ORDERS AND PROSECUTE, DEFENDANTS' MOTION TO STAY TIME TO
FILE REPLY/REQUEST FOR EXTENSION OF TIME, AND MEMORANDUM OF
POINTS AND AUTHORITIES**

**DECLARATION OF J. NYGAARD IN SUPPORT OF DEFENDANTS' REQUEST FOR
EXTENSION OF TIME**

**[PROPOSED] ORDER
GRANTING DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS, AND GRANTING DEFENDANTS' MOTION
TO DISMISS FOR FAILURE TO OBEY COURT ORDERS AND PROSECUTE**

**[PROPOSED] ORDER
STAYING TIME FOR DEFENDANTS' TO REPLY TO PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

**[PROPOSED] ORDER
GRANTING DEFENDANTS' REQUEST FOR EXTENSION OF TIME TO FILE A
REPLY TO PLAINTIFF'S OPPOSITION**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Manuel Hill (E-45048)
Pelican Bay State Prison
P.O. Box 7500
Crescent City, CA 95532-7500
In pro per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **August 4, 2008**, at San Francisco, California.

M. Luna
Declarant


Signature